



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R06-OAR-2016-0676; FRL-10186-01-R6]

Air Plan Approval; New Mexico; Excess Emissions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Pursuant to the Federal Clean Air Act (CAA, the Act), the Environmental Protection Agency (EPA) is proposing to approve a State Implementation Plan (SIP) revision from the New Mexico Environment Department (NMED) submitted on October 13, 2016. The submittal is in response to EPA's national SIP call on June 12, 2015, concerning excess emissions during periods of Startup, Shutdown, and Malfunction (SSM). The submittal requests the removal of the provisions identified in the 2015 SIP call from the New Mexico SIP. EPA is proposing to approve the SIP revision and proposing to determine that such SIP revision corrects the deficiency identified in the June 12, 2015 SIP call.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Submit your comments, identified by Docket No. EPA-R06-OAR-2016-0676 at <https://www.regulations.gov> or via email to Shar.alan@epa.gov. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of

all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, please contact Mr. Alan Shar, (214) 665-6691, Shar.alan@epa.gov. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

Docket: The index to the docket for this action is available electronically at www.regulations.gov and in hard copy at the EPA Region 6 Office, 1201 Elm Street, Suite 500, Dallas, Texas 75270. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available at either location (e.g., CBI).

FOR FURTHER INFORMATION CONTACT: Mr. Alan Shar, Regional Haze and SO₂ Section, EPA Region 6 Office, 1201 Elm Street, Suite 500, Dallas, Texas 75270, (214) 665-6691, Shar.alan@epa.gov. Out of an abundance of caution for members of the public and our staff, the EPA Region 6 office may be closed to the public to reduce the risk of transmitting COVID-19. We encourage the public to submit comments via <https://www.regulations.gov>, as there will be a delay in processing mail and no courier or hand deliveries will be accepted. Please call or email the contact listed above if you need alternative access to material indexed but not provided in the docket.

SUPPLEMENTARY INFORMATION: Throughout this document “we,” “us,” and “our” means the EPA.

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I. Background

A. EPA's 2015 SIP Action

On February 22, 2013, EPA issued a *Federal Register* notice of proposed rulemaking action outlining EPA's policy at the time with respect to SIP provisions related to periods of SSM. EPA analyzed specific SSM SIP provisions and explained how each one either did or did not comply with the CAA with regard to excess emission events.¹ For each SIP provision that EPA determined to be inconsistent with the CAA, EPA proposed to find that the existing SIP provision was substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call under CAA section 110(k)(5). On September 17, 2014, EPA issued a document supplementing and revising what the Agency had previously proposed on February 22, 2013, in light of a D.C. Circuit decision that determined the CAA precludes authority of EPA to create affirmative defense provisions.² EPA outlined its updated policy that affirmative defense SIP provisions are not consistent with CAA requirements. EPA proposed in the supplemental proposal document to apply its revised interpretation of the Act to specific affirmative defense SIP provisions and proposed SIP calls for those provisions where appropriate (79 FR 55920, September 17, 2014).

On June 12, 2015, pursuant to CAA section 110(k)(5), EPA finalized "State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup,

¹ State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, (78 FR 12460) Feb. 22, 2013.

² The term affirmative defense means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.

Shutdown and Malfunction,” (80 FR 33839, June 12, 2015), hereafter referred to as the “2015 SSM SIP Action.” The 2015 SSM SIP Action clarified, restated, and updated EPA’s interpretation that SSM exemption and affirmative defense SIP provisions are inconsistent with CAA requirements. The 2015 SSM SIP Action found that certain SIP provisions in 36 states were substantially inadequate to meet CAA requirements and issued a SIP call to those states to submit SIP revisions to address the inadequacies. EPA established an 18-month deadline by which the affected states had to submit such SIP revisions. States, including New Mexico, were required to submit corrective revisions to their SIPs in response to the SIP calls by November 22, 2016.

EPA issued a Memorandum in October 2020 (2020 Memorandum), which stated that certain provisions governing SSM periods in SIPs could be viewed as consistent with CAA requirements.³ Importantly, the 2020 Memorandum stated that it “did not alter in any way the determinations made in the 2015 SSM SIP Action that identified specific state SIP provisions that were substantially inadequate to meet the requirements of the Act.” Accordingly, the 2020 Memorandum had no direct impact on the SIP call issued to New Mexico in 2015. The 2020 Memorandum did, however, indicate EPA’s intent at the time to review SIP calls that were issued in the 2015 SSM SIP Action to determine whether EPA should maintain, modify, or withdraw particular SIP calls through future agency actions.

On September 30, 2021, EPA’s Deputy Administrator withdrew the 2020 Memorandum and announced EPA’s return to the policy articulated in the 2015 SSM SIP Action (2021 Memorandum).⁴ As articulated in the 2021 Memorandum, SIP provisions that contain exemptions or affirmative defense provisions are not consistent with CAA

³ October 9, 2020, Memorandum “Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans,” from Andrew R. Wheeler, Administrator.

⁴ September 30, 2021, Memorandum “Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy,” from Janet McCabe, Deputy Administrator.

requirements and, therefore, generally are not approvable if contained in a SIP submission. This policy approach is intended to ensure that all communities and populations, including populations overburdened by air pollution, receive the full health and environmental protections provided by the CAA.⁵ The 2021 Memorandum also retracted the prior statement from the 2020 Memorandum of EPA's plans to review and potentially modify or withdraw particular SIP calls. That statement no longer reflects EPA's intent. EPA intends to implement the principles laid out in the 2015 SSM SIP Action as the agency takes action on SIP submissions, including this SIP submittal provided in response to the 2015 SIP call.

B. New Mexico's Part 7 Excess Emissions

New Mexico Administrative Code (NMAC), Title 20 Environmental Protection, Chapter 2 Air Quality (Statewide), Part 7 Excess Emissions (20.2.7 NMAC) was approved by EPA into the New Mexico SIP on September 14, 2009 (74 FR 46910) and became federally effective on November 13, 2009.

As a part of EPA's 2015 SSM SIP Action, EPA made a finding that certain provisions in Part 7 – namely, 20.2.7.111 NMAC, 20.2.7.112 NMAC, and 20.2.7.113 NMAC of the New Mexico SIP – are substantially inadequate to meet CAA requirements, and thus issued a SIP call with respect to these provisions because these provisions provide for an affirmative defense.⁶ Although not part of the finding in the 2015 SIP call, removal of 20.2.7.111 NMAC, 20.2.7.112 NMAC, and 20.2.7.113 NMAC from the New Mexico SIP would render 20.2.7.6(B) NMAC, 20.2.7.110(B)(15) NMAC, 20.2.7.115 NMAC, and 20.2.7.116 NMAC no longer operative or problematic for SIP compliance purposes

⁵ Section J, June 12, 2015 (80 FR 33985).

⁶ See Affected States in EPA Region VI, section IX.G.4, June 12, 2015 (80 FR 33968).

because they refer to or cross-reference the substantially inadequate provisions of 20.2.7 NMAC.⁷

II. Analysis of SIP Submission

In response to EPA's June 12, 2015 SIP call, NMED requested by letter dated October 13, 2016,⁸ that EPA approve removal of 20.2.7.111 NMAC, 20.2.7.112 NMAC and 20.2.7.113 NMAC found by EPA's June 12, 2015 SIP call to be substantially inadequate to meet CAA requirements. The removal of these provisions from the New Mexico SIP eliminates the affirmative defense provisions identified in the June 12, 2015 SIP call. In addition, NMED requested that 20.2.7.6(B) NMAC, 20.2.7.110(B)(15) NMAC, 20.2.7.115 NMAC, and 20.2.7.116 NMAC be removed from the New Mexico SIP as well. EPA believes that removal of these seven provisions from the New Mexico SIP will not affect the adequacy of the remaining portions of the New Mexico SIP.

Although certain provisions of Part 7 (20.2.7.111 NMAC, 20.2.7.112 NMAC, 20.2.7.113 NMAC, 20.2.7.6(B) NMAC, 20.2.7.110(B)(15) NMAC, 20.2.7.115 NMAC, and 20.2.7.116 NMAC) are being proposed for removal from the EPA-approved New Mexico SIP, NMED intends to retain Part 7 in its entirety as a matter of state law, outside of the SIP, as a "state-only" rule. It is EPA's position that the "state-only" measure will apply only to the state's own enforcement personnel and not to EPA or to others.⁹ Since these provisions are only applicable to the State air agency, EPA's view is that the

⁷ More specifically, removal of 20.2.7.111 NMAC, 20.2.7.112 NMAC, and 20.2.7.113 NMAC from the SIP will render 20.2.7.6(B) (concerning establishing criteria to claim an affirmative defense); 20.2.7.110(B)(15) (concerning extension of notification report deadline upon receipt of written request from the owner or operator); 20.2.7.115 NMAC (concerning review of the department's determinations under sections 111, 112, and 113); and 20.2.7.116 NMAC (concerning future enforcement action) no longer operative or problematic for SIP compliance purposes as they are interrelated and refer to or cross-reference the substantially inadequate provisions of Part 7 - being proposed for removal from the SIP in response to June 12, 2015 SIP call Action - and EPA concurs with the State action and recommends that these provisions be removed from the SIP as well.

⁸ Attachment A, October 13, 2016, submittal letter from NMED Cabinet Secretary to EPA Region 6 Regional Administrator.

⁹ June 12, 2015 (80 FR 33958).

provisions need not be included within the SIP. Thus, EPA does not object to states or local air agencies that elect to revise their SIPs “to remove these provisions to avoid any unnecessary confusion.”¹⁰

The submittal also includes an analysis to demonstrate compliance with section 110(l) of the Act.¹¹ Elimination of the above-mentioned provisions of Part 7 from the New Mexico SIP is not expected to lead to any emissions increase. We do not believe the proposed revisions would interfere with attainment and reasonable further progress, or any applicable requirement of the CAA. Thus, we find that EPA’s approval would be consistent with section 110(l). Consequently, we are proposing to approve the removal of the above-referenced provisions of Part 7 Excess Emissions from the New Mexico SIP. The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction; however, in light of *Oklahoma Dept. of Environmental Quality v. EPA*, 740 F.3d 185 (D.C. Cir. 2014), the SIP applies to non-reservation Indian allotments within the State.

III. Proposed Action

EPA is proposing to approve a revision to the New Mexico SIP submitted on October 13, 2016, in response to EPA’s national SIP call of June 12, 2015, concerning excess emissions during periods of SSM. More specifically, we are proposing to approve the removal of 20.2.7.111 NMAC, 20.2.7.112 NMAC, 20.2.7.113 NMAC, 20.2.7.6(B) NMAC, 20.2.7.110(B)(15) NMAC, 20.2.7.115 NMAC, and 20.2.7.116 NMAC of Part 7 Excess Emissions from the New Mexico SIP. We are proposing to approve these revisions in accordance with section 110 of the Act. EPA is further proposing to

¹⁰ June 12, 2015 (80 FR 33958).

¹¹ Pages 11-14 of the SIP submittal, Docket ID No. EPA-R06-OAR-2016-0676.

determine that such SIP revisions correct the deficiencies identified in the June 12, 2015 SIP call with respect to the New Mexico SIP. EPA is not reopening the 2015 SSM SIP Action and is only taking comment on whether the proposed SIP revisions are consistent with CAA requirements and whether they address the substantial inadequacy in the specific provisions identified in the 2015 SSM SIP Action.

IV. Environmental Justice Considerations

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, Feb. 16, 1994) directs federal agencies to identify and address “disproportionately high and adverse human health or environmental effects” of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. EPA defines environmental justice (EJ) as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” EPA further defines the term fair treatment to mean that “no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.”¹² EPA is providing additional analysis of environmental justice associated with this action for the purpose of providing information to the public.

EPA reviewed demographic data, which provides an assessment of individual demographic groups of the populations living within New Mexico.¹³ EPA then compared

¹² <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice>.

¹³ <https://www.census.gov/quickfacts/NM?>

the data to the national average for each of the demographic groups. The results of the demographic analysis indicate that, for populations within New Mexico, the percent people of color (persons who reported their race as a category other than White alone (not Hispanic or Latino)) is significantly higher than the national average (64.1 percent versus 31.7 percent). The percent of the state population that is Hispanic or Latino is higher than the national averages (50.1 percent versus 18.9 percent) and the percent of the population that is American Indian/Alaska Native is also higher than the national average (11.2 percent versus 1.3 percent). The percent of people living below the poverty level in New Mexico is higher than the national average (16.8 percent versus 11.4 percent). The percent of people in New Mexico over age 25 with a high school diploma is lower than the national average (86.5 percent versus 88.5 percent), and the percent with a Bachelor's degree or higher is also slightly lower than the national average (28.1 percent versus 32.9 percent).

Communities in close proximity to and/or downwind of industrial sources may be subject to disproportionate environmental impacts of excess emissions. Short- and/or long-term exposure to air pollution has been associated with a wide range of human health effects including increased respiratory symptoms, hospitalization for heart or lung diseases, and even premature death. Excess emissions during periods of SSM can be considerably higher than emissions under normal steady-state operations.

As to all population groups within the State of New Mexico, we believe that this proposed action will be beneficial and may reduce impacts as explained below. As discussed earlier in this notice, this rulemaking, if finalized as proposed, would result in the removal of the provisions in the New Mexico SIP applicable to all counties in the State, except Bernalillo County, that provide sources emitting pollutants in excess of otherwise allowable amounts with the opportunity to assert an affirmative defense to violations involving excess emissions during SSM events. Removal of such

impermissible affirmative defense provisions from the SIP is necessary to preserve the enforcement structure of the CAA, the jurisdiction of courts to adjudicate questions of liability and remedies in judicial enforcement actions, and the potential for enforcement by the EPA and other parties under the citizen suit provision as an effective deterrent to violations. If finalized as proposed, this action is intended to ensure that overburdened communities and affected populations across the State and downwind areas receive the full human health and environmental protection provided by the CAA. We therefore propose to determine that this rule, if finalized, will not have disproportionately high or adverse human health or environmental effects on communities with environmental justice concerns.

V. Incorporation by Reference

In this action, we are proposing to include in a final rule regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, we are proposing to remove 20.2.7.111 NMAC, 20.2.7.112 NMAC, 20.2.7.113 NMAC, 20.2.7.6(B) NMAC, 20.2.7.110(B)(15) NMAC, 20.2.7.115 NMAC, and 20.2.7.116 NMAC of Part 7 Excess Emissions from the New Mexico SIP, as described in the Proposed Action section above. EPA has made, and will continue to make, these documents generally available electronically through www.regulations.gov and in hard copy at the EPA Region 6 office.

VI. Statutory and Executive Order Reviews

Under the Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Act. Accordingly, this action

merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the proposed rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). However, in light of *Oklahoma Dept. of Environmental Quality v. EPA*, 740 F.3d 185 (D.C. Cir. 2014), this proposed rule, if finalized as proposed, will apply to non-reservation Indian allotments within the state and, therefore, has tribal implications as specified in EO 13175. This action will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. This action will not impose substantial direct compliance costs on federally recognized tribal governments because no actions will be required of tribal governments. This action will also not preempt tribal law as no tribe in New Mexico implements a Tribal Implementation Program under the CAA. Consistent with the EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), EPA has offered consultation to tribal governments that may be affected by this action.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Particulate matter, Sulfur dioxide, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401 et seq.

Dated: September 26, 2022.

Earthea Nance,
Regional Administrator, Region 6.

